IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

UNITED STATES OF AMERICA

v. Case No. 8:03-CR-77-T-30TBM

SAMI AMIN AL-ARIAN, *et al.*,

Defendants.
_____/

DEFENDANT AL-ARIAN'S MOTION FOR RECONSIDERATION BY THE DISTRICT COURT OF THE MAGISTRATE'S ORDER CONCERNING THE DEFENDANT'S MOTION TO COMPEL

COMES NOW the Accused, Dr. Sami Amin Al-Arian, by counsel, and moves this Honorable Court to reconsider the Magistrate's May 26, 2004 Order (Doc.544) concerning the Accused's Motion to Compel (Doc.487).

INTRODUCTION

On May 26, 2004, Magistrate McCoun issued an Order concerning the Accused's Motion to Compel. The Accused contends that certain aspects of the Magistrate's Order frustrate due process in this unique and complex matter and encourage the government to withhold information critical to the preparation of the defense until the last moment, effectively granting the government an unfair tactical advantage at the January 2005 trial. Even if this Court ultimately does not find that the Magistrate's Order was "clearly erroneous" or "contrary to law,"[1] the Accused seeks guidance and assistance from this

[1] 28 USC Section 636(b)(1)(A) provides in pertinent part: "[A] judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the court [exceptions omitted] ... A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law."

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Court, being mindful that the trial is only six months away and that exculpatory evidence must be disclosed in time for effective use by the defense. See United States v. Starusko, 729 F.2d 256,261 (3rd Cir. 1984) (noting that Brady information which will require defense investigation or more extensive preparation should be disclosed at an early stage of the case); United States v. Pollack, 534 F.2d 964, 973-74 (D.C. Cir. 1976) (pretrial disclosure required to allow defense to use favorable material effectively in preparation and presentation of its case).

Specifically, the Accused requests this Court's review of the Magistrate's denial or partial denial of the following requests, as numbered in the Magistrate's Order:

1. whether [the Accused] was overheard on any electronic surveillance that was conducted on any other targets of any other investigations;

...

3. all translations utilized by the government in preparation of the indictment that differ in any way from the translations the government used to obtain the indictment and/or intends to offer at trial;

4. the names, credentials, and contact information for all translators involved in the creation and production of the translations utilized in preparation of the indictment;

...

9. information related to informants the Government may have utilized while investigating Dr. Al-Arian, consistent with Roviaro v. United States 353 U.S. 53 (1957).

I. The Accused's Request #9 Concerning *Roviaro* Informants

The Magistrate denied the Accused's request for the disclosure of Roviaro informants as overbroad.[2] The Magistrate held that the Accused made "no effort on this motion to address those factors deemed appropriate for consideration under Roviaro's balancing test" and that Roviaro does not require "the broad-ranging disclosure sought by the motion." (Doc.544 at 11-12). Citing United States v. Tenorio-Angel, 756 F.2d 1505, 1509 (11th Cir. 1985), the Magistrate held that the defense failed to make a showing "on any of the factors deemed pertinent for deciding Roviaro's balancing test." (Doc.544 at 12). Those factors include "the extent of the informant's participation in the criminal activity, the directness of the relationship between the defendant's asserted defense and the probable testimony of the informant, and the government's interest in non-disclosure." Tenorio-Angel, 756 F.2d at 1509. Courts should also consider whether the testimony of an informant implicates guilt or innocence, or merely concerns a collateral issue. See McCray v. Illinois, 386 U.S. 300 (1967). Most importantly, "[w]here the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro, 353 U.S. at 60.

At the outset, we must express concern regarding the government's handling of the informant issue and its only recent revelation that one or more Roviaro informants were employed in this case. In its March 26, 2003 Discovery Order (Doc.55), the Magistrate ordered the government to "advise the Defendant whether a confidential informant was used in this case within twenty (20) days of the date of this Order."

[2] Of course, by Roviaro informants, we refer to participants or material witnesses used by the government in the investigation of the case, not mere "tipsters."

(Doc.55 at 4. Emphasis in original.) In a letter to prior counsel dated April 15, 2003, the government advised that no confidential informants were used in this case. By letter dated January 27, 2004, undersigned counsel requested numerous discovery items including information concerning all Roviaro informants. In a letter dated March 10, 2004, the government "decline[d] to answer" our request, triggering suspicion for the first time that the government may not have been fully forthcoming in its previous response. At the hearing on the instant motion, on May 17, 2004, the government admitted that the government had in fact used an informant or informants and that it was now asserting the informant's privilege. (Hearing Tr. at 47). No explanations were given regarding the government's prior response, or when the government was going to heed the Magistrate's Discovery Order and revise the prior response, or why the government had "declined to answer" our direct request, or why the Defendant should not be permitted some relief due to the extensive delay.[3]

A view of the Indictment makes it clear that this case defies the typical Roviaro analysis. Due to the length of time and breadth of communications involved in the Indictment, it has been impossible for the defense to predict "the extent of the informant's participation in the criminal activity" or "the directness of the relationship between the defendant's asserted defense and the probable testimony of the informant" because this is not the typical case in which discrete acts or isolated transactions constitute the crime charged. Tenorio-Angel, 756 F.2d at 1509. There are more than 250 overt acts, arising from an investigation spanning a decade and a half. It is the

[3] The 13-month delay in a truthful response to the Magistrate's March 26, 2003 Discovery Order contributed to the defense's inability now to identify a discrete time and place of an informant's involvement.

accumulation of conversations and contacts, not one in particular, that forms the basis of the charges that rely largely on numerous personal and professional conversations, public speeches and events, and other contacts between Dr. Al-Arian and other individuals. Since the investigation began fourteen years ago or more, Dr. Al-Arian has interacted with thousands of people including federal law enforcement officials, prominent members of the current Bush Administration, and members of Congress. Thus, although we now know there has been at least one informant used by the government in this case, it is an exercise in rampant speculation to guess at which contact, over the past decade and a half, was or is an informant for the government.

Further, given the length of the alleged conspiracy, the government may have lost contact with its informant(s), and it is possible that it could take weeks or months to find them once they are disclosed. Indeed, for all the defense knows at this time, the government may be using the privilege to hide the fact that they do not know where these informants are or that they have intentionally caused their unavailability.

One or more of these informants, moreover, could have been "agents provocateur," informants who are not only material witnesses or participants but also inciters of action or speech.[4] The existence of such informers could provide the basis of an entrapment or public authority defense. The defense certainly would require information concerning such informants well in advance of trial as it could give rise to a stand-alone or partial defense. It is also clear that such information would be

[4] An "agent provocateur" is defined by Black's Law Dictionary as "[a] person who entraps or entices another to break the law and then informs against the other as a lawbreaker." Black's Law Dictionary 65 (7th Ed. 1999).

discoverable under Brady since it would be material to the preparation of the defense and exculpatory in both a direct and mitigating manner.

Owing to the government's misleading response to the original Order of the Magistrate, we are very concerned that thirty (30) days before trial is not enough time to integrate critical information concerning informants into the overall defense of the case. (See Doc.55). As such, we request all information concerning Roviaro informants or at least enough information to enable us to identify who they could be, what time frames are involved, and which overt acts are relevant. If the Court believes that we are not entitled to this information at this time, we would request, at a minimum, that the Court review the information concerning the government's informant(s) *in camera* so that we can be assured that the government is not concealing under the guise of the informant privilege the type of information that would compel the Court to order disclosure under Roviaro, Brady, Rule 16, or the defendant's rights to due process and to present a defense. (See, e.g., Tenorio-Angel, 756 F.2d at 1509, fn.7; United States v. McLawhorn, 484 F.2d 1, 12, fn.13 (4th Cir. 1973) ("Under this [*in camera*] procedure the defendant is not compelled to show need and the trial court is not left to mere speculation as to the materiality of the informant's testimony.") citing United States v. Jackson, 384 F.2d 825, 827 (3d Cir. 1967).

II. The Accused's Request #4 for Access to Government Translators

With regard to our request for the identity of all translators, the Magistrate denied the request without prejudice, acknowledging that "the defense may need the identity of particular interpreters to assist in the presentation of their case or at a motion hearing."

(Doc.544 at 10). The Magistrate viewed the request as overbroad, requiring a more "narrow" request before it would entertain a renewed motion. (Doc.544 at 10, fn.10).

The government has confessed a need to supersede the current indictment, although it has not indicated when that might occur. Thus, the fundamental problem with the Magistrate's requirement that we identify specific inconsistencies in the translations is that it forces the defense to reveal the inner workings of defense preparation and to educate the government as to the weaknesses in its current Indictment. The defense must maintain its right to challenge the indictment in whatever manner it is ultimately constructed by the government and to exploit any errors or misinterpretations contained within it. The "Catch-22" here, then, is that while we have already identified several problems in the translations contained in the "tech cut" summaries, we do not wish to afford the government the opportunity to take advantage of our work in creating its superceding indictment.

Moreover, we contend that the Magistrate has erroneously adopted the government's overly restrictive interpretation of what constitutes an exculpatory translation. The government contended at the hearing that "if we have a translation that doesn't reasonably convey...what was said earlier, and we realize we have a problem." (May 17 hearing at 27). The Magistrate then expressed satisfaction with the government's statement that it had "no further disclosures of that type to make." (May 17 hearing at 27). Thus, it appears the Magistrate considers exculpatory translations only to be those that contain obvious inaccuracies or misattributions, like those contained in Overt Act 253, as discussed in prior proceedings. (See May 17 hearing at 26).

Our argument is more subtle but nonetheless compelling. We contend that if there are two different interpretations of the same conversation, where one is benign and one is incriminatory, each translator possesses materially exculpatory information under Brady principles. Clearly, the translator of the benign interpretation possesses exculpatory information because he or she heard innocent speech to which the government attributes guilt. Furthermore, the translator of the more incriminating version had reasons for attributing guilt that may go beyond objective transcription and evidence bias or coercion to find incriminating words where they do not exist. Either way, in a case in which the Accused's speech forms the crux of the government's case, the way the government has interpreted what was said and, most importantly, why it was so interpreted, goes directly to the guilt or innocence of the defendant. If the government is so confident in its translations and the guilt embodied within them, there is no reason not to provide the Accused the opportunity to explore the translation process in depth by examining the translators in advance of trial.

More specifically, we contend that a summary of a conversation containing editorial comments and factual assumptions that are not supported by the government's own verbatim translation render both versions discoverable under Brady. For example, such discrepancies are evident when comparing Overt Act 239 with two underlying government interpretations of the same conversation: one is a summary created from an intercept of Hatim Fariz' telephone, and the other is a substantially verbatim translation from an intercept of Dr. Al-Arian's telephone.

Overt Act 239 alleges:

> On or about June 5, 2002, SAMI AMIN AL-ARIAN had a telephone conversation with HATIM NAJI FARIZ and SAMI AMIN AL-ARIAN asked HATIM NAJI

FARIZ for the telephone number of another individual. After HATIM NAJI FARIZ gave SAMI AMIN AL-ARIAN the number, he asked SAMI AMIN AL-ARIAN if he had heard the news about the suicide bombing. SAMI AMIN AL-ARIAN said he had and sarcastically said that HATIM NAJI FARIZ seemed upset or sad about it. HATIM NAJI FARIZ laughed and repeated the story of how he had heard about it earlier from GHASSAN ZAYED BALLUT.

Overt Act 239 closely resembles a summary made of the above-referenced phone call from the wiretap of Fariz's phone which states as follows:

Al-Aryan called Fariz and asked about the phone number for Abu Alfoz (could be Fawzi) (NFI). Fariz gave the cell number, 216-965-8383. Al-Aryan said that was disconnected, then Fariz gave him the home phone number, 440-846-9919, and another number, 440-846-1573. Fariz asked Al-Aryan if he heard the news (about the suicide bombing). Al-Aryan said yes, then sarcastically told Fariz that he seemed upset or sad about the news. Fariz laughingly repeated the story of how he received the news from Abu Fadi.

The translation of the conversation by the translator of calls emanating to and from Al-Arian's phone appears to be in substantially verbatim form and is as follows, where "S" is purportedly Dr. Al-Arian and "H" is Hatim Fariz:

S: Yesterday you gave me 'this sister's number' but evidently I didn't write it correctly
H: O.K. I don't have the number with me. It is in the office. Do you want it now or shall I give it to you tomorrow?
S: No problem, tomorrow is fine. Do have Abu Al-Fawz's number (aka Fawaz Damra's number)?
H: Yes, I have.
S: I have the area code. Just give me the number.
H: Have you heard the world's news?
S: Yes, we heard. I see you happy/or excited.
H: Ha...ha...ha...
S: Ha...ha...ha...
H: A guy told Abu Fadi (NFI) (believed to be Ghassan Balout), we talked for about half an hour but we didn't mention it in the subject. What happened politics has become like politicians. The number is 216...
S: I told you I know that...
H: 440-846-9919 and 440-846-1573 (Fawaz Darma's new numbers).
S: (Noting the numbers) and said: O.K. no problem. Thank you very much.

Obviously, in creating Overt Act 239, the government preferred the summary from Fariz's telephone that attributes sarcasm to Dr. Al-Arian's tone and draws the conclusion that "news" referred to a suicide bombing. By contrast, the verbatim translation does not attribute sarcasm to Dr. Al-Arian nor does it assume Mr. Fariz was referring to a suicide bombing. Clearly, then, the verbatim translation does not support the summary's characterization of the call that was repeated in the Indictment; therefore, we are entitled to examine the verbatim-translator. Moreover, we are entitled to ask the creator of the incriminating translation why he characterized the conversation the way he did.

As counsel stated at the hearing on this motion, we have identified other examples of material discrepancies among various translations, summaries, and the Indictment. We simply seek to explore these discrepancies without alerting the government to our thought processes and with enough time to properly prepare for trial.[5]

III. The Accused's Request #3 for All Versions of Translations

Our contention that we are entitled under Brady to prior versions of translations is similar in nature to the previous argument concerning access to translators, but the Magistrate's holding in this regard raised separate issues that we ask this Court to address.

The Magistrate found the Accused's motion for disclosure of all differing translations to be overbroad, although it acknowledged that Brady controls the inquiry and that "discrepancies between translations relied upon by the government in obtaining

[5] If, however, the Court imposes upon the government a deadline in which to supersede, and ample time is provided between that date and trial, counsel will be better able to particularize our requests for access to translators of specific conversations.

the Indictment and later translations may raise Brady concerns and will require the prosecutors' close attention." (Doc.544 at 9). The Court stated further that "[a]lready in this matter, the Government has demonstrated that it is cognizant of its duty under Brady to disclose matters material to the accuracy of its translation of the FISA intercepted communications. (See Doc 71)." (Doc.544 at 10).

Owing in part to the government's recalcitrance in disclosing the existence of informants, the defense does not share the Magistrate's faith in the government's willingness to be forthcoming on such matters, and that is why we request the intervention which the Magistrate refused to provide. Indeed, the government has demonstrated that it cannot be relied upon to identify discrepancies in its translations, as its position concerning their accuracy has fluctuated in response to its needs at any given time. For example, for purposes of this motion, the government admits that there may be discrepancies among the various translations. That is, the original verbatim translation may differ from the summary or "tech-cut" which may differ again from the final translation it intends to use at trial. At the May 17, 2004 motions hearing, for example, the government averred, "As I said in our pleading, there's no translation that is – can have perfectly translated something." (May 17 hearing at 26). The government added: "taking a translation and turning it into a full verbatim oftentimes reveals additional details, there's no doubt about that." (May 17 hearing at 27). It is clear from Overt Act 239 that the "additional details" in various translations can apparently alter the nature of the conversation substantially.

In contrast to the government's current claim that translations are fluid, the FBI Agent Kerry Myers previously took the position that the translations are completely

accurate and reliable. Agent Myers stated under oath in his Affidavit in support of his application for the February 19, 2003 search warrant that both the verbatim translations and summaries "are accurate as the translations have been crossed [sic] checked among different translators. In preparing this affidavit, your affiant as [sic] relied on these English translations and summaries of the Arabic conversations and documents." (Kerry Affidavit at 16). The translations cannot be both accurate and incomplete, nor can they justifiably "reveal additional details" each time the government revises them to suit its changing purposes in this case.[6] Indeed, it is the evolution of facially innocuous verbatim translations into incriminating Overt Acts that makes access to all the translations so critical to the defense of this case.

Moreover, in our correspondence with the government, it has consistently demonstrated that it views Brady much more narrowly than the federal courts. As such, at a minimum, we request that the Court review the prior translations *in camera* and compare them to the Indictment in order to make certain that no materially exculpatory evidence exists.

IV. The Accused's Request #1 For Information Concerning Whether Or Not He Was Overheard On Other FISA Or Title III Wiretaps

The Magistrate found the Accused's request in this regard to be overbroad and not necessarily supported by Rule 16. (Doc.544 at 8). The Magistrate did acknowledge, however, that the government is obliged under Rule 16 to provide any "relevant"

[6] The government's contrasting and self-serving positions concerning the accuracy of the translations may also violate notions of judicial estoppel. See New Hampshire v. Maine, 532 U.S. 742, 749 (2001); Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001), *vacated on other grounds*, 537 U.S. 1085, 123 S. Ct. 718 (2002).

statements by the Accused made in such overheard conversations and to provide exculpatory information from them under Brady.

The Magistrate did not recognize, however, that in preparation for a motion to suppress information from the wiretaps, the Accused must know whether any of the wiretaps he seeks to challenge were originally sought because the Accused was overheard on a wiretap from another investigation. If so, we are entitled to challenge the efficacy of the precipitating wiretaps as well as those listing Dr. Al-Arian as a target in this case. Thus, we simply ask whether the original FISA wiretaps of Dr. Al-Arian were based upon wiretaps of other individuals. If so, we request all documents supporting the legality of those intercepts.

CONCLUSION

We simply do not share the Magistrate's confidence in the government to search for, identify, and disclose all discoverable information in time for it to be used effectively at trial, absent judicial intervention. Indeed, throughout this litigation, the government has proved that it will resist disclosure at virtually every turn, even in defiance of a Court Order. As we indicated to the government as recently as an April 24, 2004 letter, we are concerned that we will be confronted with an enormous amount of pertinent information thirty (30) days or less before trial at the same time that an untold number of other matters relating to trial preparation will be occurring. The Magistrate seemed to recognize this concern when it "encouraged" – but did not order – the government "to begin making its Brady disclosures well in advance of the court imposed deadline," but it has not inquired of the government as to how much information it intends to disclose on the eve of trial. (Order at 5, fn.5).

In short, the government should not be permitted to utilize the retention of discoverable and easily producible material as a weapon with which to overwhelm the defense on the eve of trial and thereby gain an unfair tactical advantage. Accordingly, we request this Court's intervention to assist in the timely identification and production of discoverable material as stated herein and in our original Motion to Compel.

WHEREFORE, for the foregoing reasons and such others as may appear to the Court, the Accused requests that appropriate relief be granted.

Dated: 16 June 2004

Respectfully submitted,

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